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STATE BANK OF VIRGINIA v. DOMESTIC SEWING MACHINE CO.—Decided at Wytheville, June 20, 1901.—Whittle, J. Absent, Cardwell, J:

1. RECEIVER'S CONTRACTS—*Alteration by court.* The contracts of a receiver, made with expressed or implied authority, cannot be annulled at the pleasure of the court.

2. RECEIVERS—*Active and passive—Powers.* The powers of active receivers of going concerns are very much broader than those of passive receivers, who are charged with the mere preservation of property.

3. CONTRACTS—*Novation—Intention.* Whether a new security shall be taken to be a novation or substitution for and an extinguishment of a prior indebtedness, is a matter of intention; and the burden rests upon him who asserts that there has been such novation to establish it.

RECEIVERS—*Powers—Discounts—Collaterals—Change of evidence of debt—Case in judgment.* Under the evidence in this cause, the receiver had authority to discount notes which came into his hands in the course of business and to protect them by the hypothecation of other notes and securities as collateral; and, when he did so, such collaterals to the extent necessary to protect the discounts, ceased to be assets of the receivership, and became the absolute property of the party discounting. The subsequent surrender of the collaterals to the receiver was for collection only, and as agent for the true owner, and having applied such collections to expenses of the receivership the same should be restored out of the other funds in hands of the receiver.

TRUSTS AND TRUSTEES—*Diversion of fund.* A court of equity will follow a fund diverted from the owner, or charged with a lien, as far as it can be traced, and will enforce the true owner's rights against any property in which it may have been invested.

KEISTER v. KEISTER AND OTHERS.—Decided at Wytheville, June 27, 1901.—Cardwell, J:

1. DEEDS—*Partition—Husband and wife as grantees—Habendum to husband only—Case in judgment.* A father gave to his son and son-in-law a title bond in the penalty of \$1,500, with condition to convey to them certain lands. The obligees entered into possession of the lands, and a few years thereafter the obligor died intestate, and his heirs made a deed of release or quit-claim to the land. This deed makes the wives of the son and son-in-law parties of the second part, but explicitly limits the use and benefits of the property to the son and son-in-law. A few months thereafter the son and son-in-law made partition of the land by several deeds to each other. In these deeds the wives are again made parties of the second part, but the use and benefits are limited to the son and son-in-law respectively. *Held:* The wives took no interest in the land. The conveyance by the heirs was a conveyance to the son and son-in-law only, and in conveying to them the heirs simply did what the law would have compelled them to do. The subsequent deeds made by the son and son-in-law in which their wives united amounted to simply a partition of the property between them.

HUDSON v. MAX MEADOWS LAND & IMPROVEMENT CO.—Decided at Wytheville, June 27, 1901.—Harrison, J. Absent, Keith, P:

1. SPECIFIC PERFORMANCE—*Parol contract—Statute of frauds—Part performance—Inability to perform.* The acts of part performance relied on to take

this case out of the statute of frauds are not shown to be of that positive and substantial character required to bring this class of cases within the well recognized principles of equity jurisprudence, and, if they were, the evidence shows that the defendant could not perform the contract in suit even if required by the court to do so, and this is a bar to specific performance.

GREEVER AND OTHERS v. BANK OF GRAHAM.—Decided at Wytheville, June 27, 1901.—*Harrison, J.* Absent, *Buchanan, J.*

1. **APPEAL AND ERROR**—*Exclusion of evidence*—*Answer of witness*. The refusal of a trial court to permit a witness to answer a question will not be considered in this court when the expected answer is not given, as the court cannot determine its materiality.

2. **EVIDENCE**—*Relevancy*—*Declaration of officer of corporation*. The declarations of the cashier of a bank made after the acceptance of a note by the bank, touching the conditions upon which the note was delivered to the bank, are irrelevant and immaterial, where it appears that he was not present when the negotiations took place.

3. **INSTRUCTIONS**—*Fully instructed*—*Different phases of defence*—*Case at bar*. Where there are but two phases of defence, and the jury has been fully informed by one instruction upon both, it is unnecessary to repeat in another instruction anything theretofore stated for the guidance of the jury with respect to either phase of defence. In the case at bar the plaintiffs in error could not have been prejudiced by the instructions given.

LAUREL CREEK COAL & COKE CO. v. BROWNING AND OTHERS.—

Decided at Wytheville, June 27, 1901.—*Whittle, J.*

1. **LESSOR AND LESSEE**—*Rights of way*—*Estoppel*. The refusal of one of several joint lessors to sell to the lessee a right of way for a railway over other lands not leased does not estop such lessor from taking advantage of a provision in the lease rendering it void if a right of way for a railway to the leased premises was not obtained by condemnation or otherwise in a given time. The mere existence of a lease does not impose an obligation to grant the right of way, nor estop the lessor from a *bona fide* effort to protect his property from serious injury.

2. **CHANCERY JURISDICTION**—*Complete relief*—*Partition*. When a court of equity acquires jurisdiction of a cause for any purpose, it will retain it and do complete justice between the parties, enforcing, if necessary, legal rights and applying legal remedies to accomplishing that end. This is especially true in suits for partition.

3. **CHANCERY PRACTICE**—*Cancellation*—*Failure of purpose of contract*—*Inability to perform*. Where a contract has failed of its purpose by the default of one of the parties, occasioned by either his inability or unwillingness to comply with its provisions, a court of equity, having acquired jurisdiction of the parties and the subject matter, will not hesitate at the instance and for the relief of party not in default, to cancel the contract if it stands as a barrier in the way of doing complete justice in the cause.